STATE OF MICHIGAN
SUPREME COURT

Appeal from the Court of Appeals
Judges: Elizabeth L. Gleicher, Amy Ronanyne Krause, and Michael J. Riordan

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee

Supreme Court No 148305
Court of Appeals No. 304935
Lower Court No. 08-23581-FC

vs

FERONDA MONTRE SMITH,
Defendant-Appellant

Judge: Farah

ATTORNEY FOR PLAINTIFF-APPELLEE	ATTORNEY FOR DEFENDANT-APPELLANT
David S. Leyton P35086 Genesee County Prosecutor **Vikki Bayeh Haley** P43811 Assistant Prosecutor 100 Courthouse Flint, Michigan 48502 (810) 257-3210	**Valerie R Newman** P47291 3300 Penobscot Building 645 Griswold Detroit, MI 48226 (313) 256-9833

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

Oral Argument Requested

Submitted by:
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Statement of Jurisdiction

Defendant's statement of jurisdiction is accurate. The People do not contest the jurisdiction of this Court.

Counter-Statement of Questions Presented

Issue I

Defendant was arrested December 13, 2007 and trial began May 10, 2011. Defendant's case involved numerous co-defendant's that collectively had over 100 charges including racketeering and homicides involving 12 victims. Motions filed by both sides contributed to delay. The trial court properly denied defendant's speedy trial claim and held that delays did not impair defendant's ability to present a defense.

Plaintiff-Appellee says yes.

Defendant-Appellant says no.

Issue II

Defendant fails to show perjury in the mere inconsistency between one witness's testimony at trial and a different witnesses' testimony at a prior hearing. The witness's testimony at trial was corroborated by third witness. Therefore, defendant's claim that the prosecutor committed misconduct by failing to correct perjured testimony must be rejected.

Plaintiff-Appellee says yes.

Defendant-Appellant says no.

Counter statement of facts

Defendant-Appellant, Feronda Montre Smith, was charged with the following

Count I: First-Degree Felony Murder, MCL 750.316(1)(b)
Count 2: Armed Robbery, MCL 750.529
Count 3 Carrying a Concealed Weapon, MCL 750.227
Count 4: Felon in Possession of a Firearm, MCL 750.224f
Count 5: Felony Firearm, MCL 750.227b
Count 6: First-Degree Premeditated Murder, MCL 750.316
Count 7: Carrying a Concealed Weapon, MCL 750.227
Count 8: Felon in Possession of a Firearm, MCL 750.224f
Count 9: Felony Firearm, MCL 750.227
Count 10: Delivery of Cocaine Less than 50 Grams, MCL 333.7408a
Count 11: Conducting Criminal Enterprise, MCL 750.159i(1)

At trial Defendant was convicted of Armed Robbery and First-Degree Felony Murder. (TT[1] IX pp 8-9 @ Plaintiff's Appendix 1b-2b).

Summary of Evidence Submitted at Trial.

Sgt. Patrick Brady

Sergeant Patrick Brady was responsible for isolating audio recordings in relation to the 911 call and creating a tape of the relevant audio. (TT Volume II May 11, 2011 pp 21-22 @ Plaintiff's Appendix 3b-4b). According to Brady, the call detail sheet of this tape was accurate in regards to the tape's content. The sheet indicated that on November 5, 2005, the department received a call at 6:36 a.m. from a person that identified himself as Quan. The dispatcher noted the address as 501 East Hobson and that the call involved a possible DOA. (TT Volume II May 11, 2011 p 28 @ Plaintiff's Appendix 5bb). The tape and the transcript were both admitted into evidence. (TT Volume II May 11, 2011 p 30 @ Plaintiff's Appendix 6b).

Linda Anthony

[1] "TT" denotes "Trial Transcript"

Linda Anthony was the identification technician called to the scene at 501 East Hobson regarding the homicide. When she arrived, detectives who were already on the scene instructed her to take photographs and collect evidence. (TT Volume II May 11, 2011 pp 31-33 @ Plaintiff's Appendix 7b-9b). Her photographs from the scene were admitted into evidence. (TT Volume II May 11, 2011 p 36 @ Plaintiff's Appendix 10b). Anthony presented five pages of property sheets, which detailed items that were found at the crime scene. These items included illegal substances, bullet casings and blood samples. The property sheets were also admitted into evidence. (TT Volume II May 11, 2011 pp 37–41 @ Plaintiff's Appendix 11b-15b).

Linda Anthony was called to court again the next day. Photos taken by other technicians were admitted into evidence and Anthony clarified that she had never taken a print off of a doorknob. (TT Volume III May 12, 2011 pp 18, 20 @ Plaintiff's Appendix 16b-17b).

Tonya Griffin

Tonya Griffin was a police terminal operator who collected evidence from Sergeant Jeff Collins on November 6, 2005. The evidence she recorded on the property receipt included a tube of blood, spent shell casings, and clothes from the victim. This receipt was admitted into evidence. (TT Volume II May 11, 2011 pp 69-71 @ Plaintiff's Appendix 19b-20b).

Marquis Sanders

Marquis Sanders called the victim on both the morning of and the night of the homicide. In the morning Pass answered and Sanders went to his house and purchased cocaine from him (TT Volume II May 11, 2011 pp 81-82 @ Plaintiff's Appendix 21b-22b). At night, Pass did not answer the phone so Sanders went to his house with three other men. He knocked on the door and there was no response, so he opened the door and found Pass dead on the floor. (TT Volume II May 11, 2011 pp 82-84 @ Plaintiff's Appendix 23b-25b). He and the others left briefly before returning to the house to retrieve cocaine. They then left and went home. (TT Volume II May 11, 2011 pp 86-88 @ Plaintiff's Appendix 26b-28b). Sanders did not call the police because he was high and was dodging parole. (TT Volume II May 11, 2011 p 88 @ Plaintiff's Appendix 28b). Sanders denied killing Pass. (TT Volume II May 11, 2011 pp 89 @ Plaintiff's Appendix 29b). Cross examination revealed that Sanders was surprised that Country was not armed because he had left a gun at Country's on a previous occasion. (TT Volume II May 11, 2011 pp 95-97 @ Plaintiff's Appendix 30-32b). On redirect Sanders clarified that leaving the weapon there was collateral for buying drugs, until he was able to get the money. (TT Volume II May 11, 2011 pp 108-110 @ Plaintiff's Appendix 33b-35b).

Tywone Bonner

On the night of November 5, 2005, Bonner was at his cousin's, Shaquana Kidd, house. Sanders called Bonner that night and Bonner picked him up on Saginaw Street. (TT Volume II May 11, 2011 pp 114-115 @ Plaintiff's Appendix 36b-37b). He drove them to Pass's house to purchase drugs. Bonner parked on the road and waited for Sanders, but Sanders came back after

a few seconds after finding Pass dead in the house. Bonner called Kidd to tell her what happened and told her to call the police. (TT Volume II May 11, 2011 pp 115-116, 119 @ Plaintiff's Appendix 38b-40b). At trial, he testified that he did not hear gunshots when Sanders was in the house. (TT Volume II May 11, 2011 p 134 @ Plaintiff's Appendix 41b). Prior to the trial Bonner told police that he had heard shots when Sanders went to the house, but at trial he testified that they did not come from the house. (TT Volume II May 11, 2011 pp 124-125 @ Plaintiff's Appendix 42b-43b). Bonner dropped Sanders off and went home. (TT Volume II May 11, 2011 p 118 @ Plaintiff's Appendix 44b).

Eric Imeson

Eric Imeson was part of the ambulance crew called to 501 East Hobson at 6:00 in the morning. Upon arrival they found Mr. Pass inside with no signs of life. The crew called Hurley hospital to confirm Pass's death (TT Volume III May 12, 2011 pp 8-9 @ Plaintiff's Appendix 45b-46b).

Alona Smallwood

Alona Smallwood was a crime scene technician in training who was called to the scene to observe with Sheila Williams. Smallwood took photos while at the scene and took a plastic baggie from the victim. (TT Volume III May 12, 2011 pp 40-41 @ Plaintiff's Appendix 47b-48b).

Officer Karl Petrich

Karl Petrich was one of the first officers that responded to the 9-1-1 call. After arriving at the scene he discovered the victim in the house and secured the scene. (TT Volume III May 12, 2011 pp 48-49 @ Plaintiff's Appendix 49b-50b). At some point, he was approached by

Shaquana Kidd, who had placed the call. (TT Volume III May 12, 2011 p 51 @ Plaintiff's Appendix 51b).

Officer Randolph Tolbert

Tolbert was the other officer that arrived on the scene. He observed the victim inside the house and helped preserve the scene. (TT Volume III May 12, 2011 pp 61-62 @ Plaintiff's Appendix 52b-53bb).

Sgt. Terry Coon

Terry Coon was a police officer with the City of Flint who was assigned to investigate the murder scene. (TT Volume III May 12, 2011 pp 67-68 @ Plaintiff's Appendix 54b-55b). He created the scene narrative and collected evidence. (TT Volume III May 12, 2011 pp 70-72 @ Plaintiff's Appendix 56b-58b). The evidence was then turned over to Sergeant Ellis. (TT Volume III May 12, 2011 p 92 @ Plaintiff's Appendix 59b). Much of the evidence he collected was admitted by the trial court (TT Volume III May 12, 2011 pp 79-89 @ Plaintiff's Appendix 60b-70b).

Sgt. Ronald Nelson

Ronald Nelson was an officer for the City of Flint Police Department assigned to the scene. He recorded the evidence that was seized on a tabulation sheet and detailed where in the house it was seized from with a drawing. (TT Volume III May 12, 2011 pp 124-125 @ Plaintiff's Appendix 71b-72b).

Dr. Bernardino Pacris

Bernardino Pacris was the deputy medical examiner for the Oakland County medical examiner's office and was recognized by the court as an expert in forensic pathology. (TT Volume IV May 13, 2011 pp 5-6 @ Plaintiff's Appendix 73b-74b). From his internal and external examination of the victim, Pacris concluded that the cause of death was multiple gunshot wounds and the manner was homicide. (TT Volume IV May 13, 2011 p 11 @ Plaintiff's Appendix 75b).

Tracy Woodson

Tracy Woodson was friends with Shaquana Kidd. (TT Volume IV May 13, 2011 p 33 @ Plaintiff's Appendix 76b). She heard the answering machine at Kidd's house and heard a message from Tywone Bonner. Bonner said that Mr. Pass was dead (TT Volume IV May 13, 2011 p 36 @ Plaintiff's Appendix 77b). Woodson and Kidd went around the block to Pass's house. The side door was open and Kidd saw Mr. Pass's body. They returned to Kidd's residence and called the police. (TT Volume IV May 13, 2011 pp 40-41 @ Plaintiff's Appendix 78b-79b.

Mark Yancy

Mark Yancy knew Larry Pass as a person who sold drugs in the neighborhood. Yancy purchased drugs from him in the past. He knew Feronda Smith from living down the street from him. (TT Volume IV May 13, 2011 pp 57-58 @ Plaintiff's Appendix 80b-81b). Yancy said that he and Smith had a prior dispute. (TT Volume IV May 13, 2011 p 62 @ Plaintiff's Appendix 82b). Yancy was at Pass's house two different times on November 5. The first time, Yancy purchased cocaine from Pass. He returned because he noticed that Pass was playing a football videogame on the PlayStation and asked if he could come back to play with him. (TT Volume IV May 13, 2011 pp 59-60 @ Plaintiff's Appendix 83b-84b). While they were playing the game,

there was a knock on the door and Pass answered. Feronda Smith and Terance Lard came inside. Smith asked to purchase cocaine. (TT Volume IV May 13, 2011 p 62 @ Plaintiff's Appendix 85b). Pass went to get the cocaine from the bathroom and when he came back Smith shot him. He did not see Smith fire the shots but heard multiple gunshots. (TT Volume IV May 13, 2011 p 67 @ Plaintiff's Appendix 67b). Yancy stood up and Lard pulled out a gun. Lard asked if he knew where the dope was and Yancy replied that he did. Lard told him to go get the dope and Yancy retrieved it from the bathroom. (TT Volume IV May 13, 2011 pp 68-69 @ Plaintiff's Appendix 87b-88). He gave the dope to Lard. (TT Volume IV May 13, 2011 p 70 @ Plaintiff's Appendix 89b). The three left the house together, Yancy leaving in his van and Lard and Smith leaving on foot. The two stopped Yancy while he was driving and followed him to his sister's house. Yancy dropped his vehicle off and got into a car with Lard and Smith. He left with them to try and get them to trust him and used the drugs with them. (TT Volume IV May 13, 2011 pp 71-73 @ Plaintiff's Appendix 90b-92b). Yancy denied setting up the robbery and denied killing Larry Pass. (TT Volume IV May 13, 2011 p 74 @ Plaintiff's Appendix 93b).

Sgt. Ronald Ainslie

Ronald Ainslie worked for the Michigan State Police crime lab and was recognized by the court as an expert in the field of firearms and tool mark analysis. (TT Volume V May 17, 2011 pp 27-29 @ Plaintiff's Appendix 94b-96b). According to Ainslie's analysis, at least seven casings found at the scene of the crime were all fired from the same gun, with the last casing too damaged to determine. The bullets that were recovered were also all fired from the same gun, although he could not conclude that they were from the same gun as the casings without having access to the gun. (TT Volume V May 17, 2011 p 35 @ Plaintiff's Appendix 97b). Both the

casings and the bullets came from a nine millimeter Luger caliber firearm. (TT Volume V May 17, 2011 p 42 @ Plaintiff's Appendix 98b).

Elaine Dougherty

Elaine Dougherty worked for the Michigan State Police crime lab and was recognized by the court as an expert in the field of chemistry and analysis of narcotics. (TT Volume V May 17, 2011 pp 43-45 @ Plaintiff's Appendix 99b-101b). She identified the material in the plastic baggy as being cocaine and the cigarette butt as containing marijuana. (TT Volume V May 17, 2011 p 46 @ Plaintiff's Appendix 102b).

Sgt. Jeff Collins

Jeff Collins worked for the Detective Bureau and assisted Sergeant Ellis with the case. He attended the autopsy and collected evidence from the autopsy, which he took back to the police department. He also gave Sergeant Ellis the names of possible suspects for the homicide, including Feronda Smith, Terance Lard and Richard Wallace. (TT Volume V May 17, 2011 pp 71-72 @ Plaintiff's Appendix 103b-104b).

Sgt. Ryan Larrison

Ryan Larrison was a firearm and tool mark examiner working at the Michigan State Police forensic lab and was recognized by the court as an expert in the field of firearms and tool mark analysis. (TT Volume V May 17, 2011 pp 79-81 @ Plaintiff's Appendix 105b-107b). Larrison's analysis concluded that the two bullets he examined from the crime scene were fired from the same barrel, and that the bullets examined by Ron Ainslie also came from the same barrel as these bullets. (TT Volume V May 17, 2011 p 83 @ Plaintiff's Appendix 108b).

Dishonder Williams

Dishonder Williams had children with Larry Pass. She spoke to him the day he died because he was supposed to meet her later that day. She was aware that Pass sold drugs. (TT Volume V May 17, 2011 pp 103-104 @ Plaintiff's Appendix 109b-110b).

Kathleen Boyer

Kathleen Boyer worked for the Michigan State Police forensic lab and was recognized by the court as an expert in fingerprint analysis. (TT Volume VI May 18, 2011 pp 35-36 @ Plaintiff's Appendix 111b-112b). Boyer testified that she was able to pull three fingerprints from items submitted to evidence. Two belonged to Larry Pass, while the third was not able to be identified. (TT Volume VI May 18, 2011 p 42 @ Plaintiff's Appendix 113b).

Shaquana Kidd

Shaquana Kidd went to Larry Pass's house the day of his murder to buy dope. When she returned, she and Tracy Woodson went out. Kidd and Woodson returned around six in the morning. When she returned, she got Tywone Bonner's messages and went around the block to Pass's house to check on him. (TT Volume VI May 18, 2011 p 65 @ Plaintiff's Appendix 114b). After spotting Pass from the doorway, Kidd called the police. She returned home but came back to talk to the police when they arrived. (TT Volume VI May 18, 2011 pp 66 @ Plaintiff's Appendix 115b).

Tarence Lard

On November 5, 2005, Lard went to Pass's house with Feronda Smith. (TT Volume VI May 18, 2011 pp 84 @ Plaintiff's Appendix 116b). The two walked there with the intention of

buying cocaine. (TT Volume VI May 18, 2011 p 87 @ Plaintiff's Appendix 117b). Mark Yancy was present when they arrived, sitting on the couch. (TT Volume VI May 18, 2011 p 88 @ Plaintiff's Appendix 118b). Pass went to the bathroom and when he came back, Smith said 'it wasn't enough'. Pass went back to the bathroom and then Lard heard several quick gunshots. (TT Volume VI May 18, 2011 pp 92-93 @ Plaintiff's Appendix 119b-120b). Lard saw Smith kneel down over Pass. He did not see Pass with a gun. After Pass was shot, Lard told Yancy that he'd better get the dope. Yancy ran to the bathroom and got the dope. Lard took it then gave it to Smith. The three men left the residence. Lard testified that neither he nor Yancy shot Pass, but that Smith had shot him. (TT Volume VI May 18, 2011 pp 95-97 @ Plaintiff's Appendix 121b-123b). Lard did not know they were going to Pass's residence to rob him, and testified that he would not have gone had he known. (TT Volume VI May 18, 2011 pp 98 @ Plaintiff's Appendix 124b). He denied having a gun. (TT Volume VI May 18, 2011 pp 95 @ Plaintiff's Appendix 125b).

Sgt. Shawn Ellis

Shawn Ellis was a sergeant with the Flint Police Department, who a homicide detective at the time of the murder. (TT Volume VII May 19, 2011 pp 22 @ Plaintiff's Appendix 126b). He was the officer in charge for this particular homicide. (TT Volume VII May 19, 2011 pp 23 @ Plaintiff's Appendix 127b). In July 2006, a fellow officer informed Ellis that Mark Yancy was in the house when the murder occurred. He interviewed Yancy in September 2006. (TT Volume VII May 19, 2011 pp 25-27 @ Plaintiff's Appendix 128b-131b). Sergeant Ellis believed with certainty that Feronda Smith killed Larry Pass. (TT Vol VII May 19, 2011 pp 42 @ Plaintiff's Appendix 132b).

The People will supplement the facts as needed in their argument.

Issue I

Defendant was arrested December 13, 2007 and trial began May 10, 2011. Defendant's case involved numerous co-defendant's that collectively had over 100 charges including racketeering and homicides involving 12 victims. Motions filed by both sides contributed to delay. The trial court properly denied defendant's speedy trial claim and held that delays did not impair defendant's ability to present a defense.

Standard of Review

"The determination of whether the defendant was denied a speedy trial is a mixed question of fact and law." *People v Waclawski,* 286 Mich App 634; 780 NW2d 321 (2009). "The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to de novo review." *Id.*

Argument

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions. US Const, AM VI; Const 1963, art 1, § 20. In determining whether a defendant has been denied his constitutional right to a speedy trial, a court must balance four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Vermont v Brillon,* 556 US 1; 129 S Ct 1283, 1290; 173 L Ed 2d 231, 239-240 (2009).

"[T]here is no set number of days between a defendant's arrest and trial that is determinative of a speedy trial claim." *Waclawski,* 286 Mich. App 665. However, "a delay of six months is necessary to trigger an investigation into" a claim that a defendant has been denied a speedy trial. *People v Walker*, 276 Mich App 528; 541; 741 NW2d 843 (2007), vac'd in part on other grounds 480 Mich. 1059 (2008). A delay of more than 18 months creates a rebuttable

presumption of prejudice to the defendant, and shifts the burden of proving lack of prejudice to the prosecution. *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993).

Length of Delay

In this case, defendant was arrested sometime before December 17, 2007, as he was arraigned on December 17, 2007[2], and trial began May 10, 2011[3], not long after the trial court denied defendant's second motion to dismiss on a speedy trial claim. (See Trial Court's Order Regarding Speedy Trial Motion Defendant's Appendix p 292a-293a). Obviously, over 18 months passed between the time of Defendant's arrest and his trial.

Causes of Delay

This case involved multiple defendants and voluminous materials for the attorneys to review. The preliminary examination began on July 22, 2008. The trial court, in its first order denying defendant's motion to dismiss, found that the adjournments between December 28, 2008 and April 23, 2008, were granted at the People's request and related to discovery issues and proffers. The trial court attributed this delay to the People. (Defendant's Appendix 192a-193a).

As noted by the trial court, by April 23, 2008, there were 14 codefendants in this case, including defendant, with the total charges exceeding one hundred. Racketeering and homicide were part of the charges naming 12 victims. Some defendants, including Defendant Smith, requested adjournments. The exam began on July 22, 2008 and concluded September 16, 2008. The examining magistrate conducted separate bindover motions and defendant was arraigned in the circuit court on October 20, 2008. (Defendant's Appendix 193a). The trial court attributed this time to the people but with "neutral tint and minimal weight." (Defendant's Appendix 194a).

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[2] See district court docket entries Plainitff-Appellee's Plaintiff's Appendix p 1b

[3] See circuit court docket entries Defendant-Appellant's Plaintiff's Appendix p 37a

Once the matter was bound over to the circuit court, both sides filed motions. On March 18, 2009, the People filed a motion to take DNA samples and filed motions to consolidate defendant's case with his codefendants. (Defendant's Appendix 10a).

Defendant filed his own motions related to discovery and his claim concerning the seizure of materials from his jail cell. He also filed other assorted motions relating to evidentiary issues. (Defendant's Appendix 18a). Even though defendant had filed his own motions which required time to resolve, the trial court attributed the delay between October 20, 2008 and March 18, 2009 to the People, but accessed it with minimal weight since defendant had filed his own motions during this time. (Defendant's Appendix 194a).

Around April 9, 2009, defendant filed a motion to quash. (Defendant's Appendix 9a). This caused an additional delay to August 21, 2009 in order to review and resolve defendant's claim. As noted by the trial court, the preliminary exam transcript consisted of over 4500 pages in addition to the transcripts related to bindover motions. This time was attributed to the defendant.

Outstanding defense requests concerning discovery added to the delay until the trial court ruled on the discovery motions on December 17, 2009. The People had a right to respond and litigate to resolution all pretrial motions or issues raised by a defendant. See *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). The prosecutor should not be barred from making a legitimate response to a motion just because it concerns discovery.

The trial court sent a notice of a trial date on February 25, 2010, but it had to be adjourned because the parties were still awaiting the test results of the DNA.

In his current brief on appeal, Defendant points to a specific instance on June 22, 2010, where both parties were ready to go to trial but the trial court, sua sponte, adjourned for the

purposes of correcting errors in the preliminary examination transcript. (Defendant's Appendix 201a-215a). Sometime after this particular adjournment, defendant's attorney, Anthony Vance, withdrew from the case to pursue a new employment opportunity and attorney Barney Whitesman was appointed as substitute counsel. The appointment of substitute counsel required additional adjournments to allow Mr. Whitesman time to adequately prepare for trial. Defendant contends that the trial court erred in adjourning the case on June 22, 2010. However, it is clear that the adjournment was not a purposeful delay tactic. As the Court of Appeals pointed out, there is a legitimate interest in preserving the accuracy of the pleadings. (Defendant's Appendix 412a). As the trial court pointed out, it had previously relied on the transcripts to make rulings on the case and needed any errors in the transcripts to be corrected so that the court and the parties could be assured that those rulings were accurate. (Defendant's Appendix 204a).

Assertion of Delay

Defendant made an oral assertion of his right to a speedy trial at his first arraignment in district court. (Defendant's Appendix 61a-62a). On January 4, 2010, he filed a motion to dismiss based on his speedy trial claim. The trial court denied this motion on April 22, 2010. (Defendant's Appendix 191a-197a). He now argues that his right to speedy trial was violated when, on June 22, 2010, the trial court adjourned the trial date to allow for time to correct transcripts. However, the record indicates that although the defendant and prosecutor declared their readiness to proceed to trial, defendant posed no objection to adjourning the trial date to correct transcripts. Rather, defendant actually expressed his concern about potential errors in the transcript and provided the court with specific information about which transcripts should be corrected. (Defendant's Appendix 216a-217a).

On February 15, 2011, Defendant filed a second motion for dismissal based on his claim that his rights to a speedy trial were violated. (Defendant's Appendix p 33a). The trial court denied that motion on April 26, 2011. (Defendant's Appendix 292a-293a).

Prejudice

Deprivation of the right to speedy trial does not per se prejudice the accused ability to defend himself. *Barker v Wingo*, 407, 514; 521; 92 S Ct 2182, 2187; 33 L Ed 2d 101 (1972). In *People v Chism,* 390 Mich 104, 116; 211 NW2d 193 (1973) the court held that a 27 month delay between arrest and trial did not warrant dismissal even where the defendant suffered personal hardship from incarceration when there was no prejudice to his ability to present a defense at trial.

Prejudice is assessed in the light of three interests, which the speedy trial right was designed to protect: (i) prevention of oppressive pretrial incarceration; (ii) minimization of anxiety and concern of the accused; and (iii) limitation of the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant to adequately to prepare his case skews the fairness of the entire system. For example, the death of a witness is an obvious example of prejudice. Prejudice might also exist where defense witnesses are unable accurately recall events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. *Barker v Wingo*, 407 US 514, 532; 92 S Ct 2182, 2193; 33 L Ed 2d 101 (1972). Anxiety, standing alone, fails to establish a violation. *Gilmore, supra.*

As the United States Supreme Court has pointed out a delay in trial often works to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their

memories may fade. If the witnesses support the prosecution, its case can often times be seriously weakened. *Barker v Wingo*, 407 US 514, 521; 92 S Ct 2182, 2187; 33 L Ed 2d 101 (1972).

Defendant argues that the delay in trial prejudiced him because a taped statement of Terrance Lard, made in 2009, was destroyed in a flood.[4] The flood is obviously not the product of bad faith on the prosecutor's part. Defendant speculates that impeachment was not possible without the tape. However, defendant had ample opportunity to attack Lard's credibility because he was a codefendant who entered into a favorable plea agreement in exchange for his testimony. Few things are more effective in attacking witness's credibility than evidence that the witness is only testifying because they entered into a "deal" with the prosecutor.

While the People requested adjournments and needed time to prepare for this complex case, the record is clear that defendant was not ready to proceed to trial. Defendant gave lip service to his speedy trial claim yet he had his own motions and issues to pursue before he could be ready for trial.

Defendant also argues that Dann Harris did not testify at trial, but does not indicate whether his absence at trial was due to the delay. Harris was the FBI agent who, at a prior hearing, testified that Mark Yancy provided information on this case in exchange for money. Yancy testified that he did provide law enforcement with information about numerous cases and admits he was paid, but he testified that he was not paid for information for this particular case. This inconsistency is the subject of Issue II.

[4] The flood occurred in the beginning of September in 2010 in a building that houses both the 68th district court and a portion of the prosecutor's office. The assistant prosecutor's office was in this same building.

Defendant did not seek to introduce evidence of Dann Harris's prior testimony at trial. The best way to have used Harris's testimony would have been to introduce his prior testimony. Had Harris testified at trial, he would have had the opportunity to explain any inconsistency or misunderstanding regarding what information Yancy received payment for. Harris's absence had no negative impact on defendant.

Long after the trial court, in June 2010, adjourned the trial date to correct transcripts, defendant continued to file motions related to evidentiary issues. (Defendant's Appendix p 28a, 29a, 30a, 33a). He filed multiple supplemental witness and exhibit lists. (Defendant's Appendix 28a, 29a, 33a). Defendant suffered no prejudice in this delay. Rather, he used the time to his advantage to prepare for trial.

Issue II

Defendant fails to show perjury in the mere inconsistency between one witness's testimony at trial and a different witnesses' testimony at a prior hearing. The witness's testimony at trial was corroborated by third witness. Therefore, defendant's claim that the prosecutor committed misconduct by failing to correct perjured testimony must be rejected.

Standard of Review

Defendant presents an unpreserved claim of prosecutorial misconduct which must be examined for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Reversal is unwarranted unless a failure to review the issue would result in the miscarriage of justice. *People v Unger*, 278 Mich App 210; 749 NW2d 272 (2008).

Argument

Defendant argues that the prosecutor had a duty to correct what he characterizes as perjured testimony. At trial, witness Mark Yancy admitted he received $4,500.00 from federal authorities. He said this money was consideration for information he provided on a matter unrelated to the present case. At a prior hearing, Agent Dann Harris testified that the payment was for only $4,000.00 and was consideration for an unrelated matter but also for the present case. Although Harris's prior testimony was known to defendant, he did not seek to impeach Yancy nor did he present any claim of perjury or prosecutor misconduct to the trial court

A prosecutor has a duty to correct perjured testimony. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). A defendant's entitlement to relief occurs only where the alleged perjured testimony was 1) knowingly used and 2) contributed to the defendant's conviction. In this case, nothing in the record suggests the occurrence of perjured testimony or that it was knowingly used. Additionally, there is no evidence the testimony at issue contributed to the defendant's conviction.

Defendant describes two specific conflicts between the trial testimony of witness Mark Yancy and the testimony of Dann Harris at a hearing that took place months before trial. First, Yancy's testimony about the amount of money he received was $500.00 more than the amount given by Harris. Second, Yancy's testimony and Harris's testimony conflicted over whether that payment included information Yancy provided on the present case. However, conflicting testimony, standing alone, fails to support an allegation of perjury. *People v Kozyra,* 219 Mich App 422, 429; 556 NW2d 512 (1996).

In this case, defendant mischaracterizes Yancy's testimony as perjury. The record merely shows a conflict between Yancy and Harris concerning the amount of money paid and whether the money was paid in consideration for information Yancy provided on this case. Moreover, defendant was aware of Harris's testimony at the prior hearing and could have easily impeached Yancy's credibility, but opted not to do so.

There is no evidence to suggest that the prosecutor deliberately elicited the portion of Yancy's testimony that conflicted with Harris or that she had personal knowledge concerning how Yancy was paid. Additionally, witness Shawn Ellis, a member of the FBI task force corroborated Yancy's testimony that no compensation was given for the present case. (TT Vol VII pp 24 and 27 (@ Plaintiff's Appendix 132b, 135b).

The amount of money police paid Yancy for information and whether any of that money was specifically designated for this case did not ultimately contribute to defendant's conviction. The amount of money he got paid and for what cases the payments was applied did not make him any more or less of a paid police informant. The jury was aware that Yancy sold information to police. Whether or not payment was specific to this case or some other case was really irrelevant to the issue of Yancy's credibility. Any attack on Yancy's credibility came from

the evidence that he was a paid police informant i.e., a paid snitch. The actual dollar amount Yancy received neither added nor detracted from his credibility nor on defendant's ability to attack his credibility. Defendant could have just as easily attacked Yancy's credibility if the evidence indicated he was paid a mere dollar for the information he gave to police. A snitch is a snitch, no matter their price.

Moreover, defendant was aware of Harris's prior testimony. At trial, defendant had the opportunity to challenge Yancy's credibility on the question of whether he got paid specifically for defendant's case – or at least clarify the issue. He declined to do so. Likely, defendant made a strategic decision declining to pursue because to haggle over the actual dollar amount would have been a useless strategy and would have missed the big picture that Yancy was a "snitch."

The record does not establish that Yancy's testimony was false, mistaken, or perjured. The challenged testimony cannot be said to have contributed to defendant's conviction. The jury was aware of Yancy's status and accessed his credibility accordingly.

Defendant fails to show prosecutor misconduct.

Relief

For these reasons set forth above, the People ask this Honorable Court to affirm.

Dated: Oct 16, 2014

Submitted by:

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